divested of her rights therein, probably by a mere change of residence,[17] but at least by the acquisition of another homestead.[18] A husband might accordingly by such abandonment be enabled to carry out his contract to sell the homestead without doing anything contrary to the policy of the statute.

But looking at actualities rather than theoretical arguments, as the court must in considering the effect of the policy of the statute, it is fully justified in holding the contract void. There is a practical difference between an obligation to pay money arising from the breach of the husband's contract to convey the homestead, and the obligations arising from other losing contracts of the husband. Here the obligation would arise from the wife's refusal to carry out her husband's wishes. And, in such circumstances, the prospect of material loss is by no means the most potent influence impelling her to agree to the conveyance. For not only would she shun the publicity which a damage suit would give such domestic discord, but she would also wish to avoid the reproaches of a disgruntled husband complaining that her stubbornness had turned a seemingly good bargain into a liability for damages.

Nor is the argument that the husband may fulfill his contract by abandoning and then conveying the homestead by any means conclusive. Just what may be the effect, under varying conditions, of abandonment of the homestead by the husband without the wife's consent is not clear on the authorities.[19] But just as the common law placed limits on the husband's right to determine the family residence,[20] so there are obviously cases where the policy of the Homestead Act will not allow a mere purported abandonment in utter disregard of the family's welfare to deprive the wife of her interest.[21] So here again the wife's consent would be essential to the performance of the contract. Moreover it is these cases, where a shiftless and irresponsible husband, or a husband bent on speculation, contemplates not merely an abandonment of the homestead but a virtual abandonment of the family, that constitute the real menace to the policy of the homestead laws. They should, therefore, be of the greatest weight in determining the attitude of the courts on the husband's contracts, and justify holding those contracts void.

RIGHTS OF THE TRUSTEE IN BANKRUPTCY UNDER MODERN LIFE INSURANCE POLICIES. — The disposition of life insurance policies upon the bankruptcy of the insured has long been a source of confusion in the

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[17] Brennan *v.* Wallace, 25 Cal. 108 (1864); Stewart *v.* Pritchard, 101 Ark. 101, 141 S. W. 505 (1911).

[18] A recent case apparently holds that a new homestead must be acquired to defeat the wife's right in the former homestead if she does not consent to the abandonment. Fisher *v.* Gulf Production Co., 231 S. W. 450 (Tex. Civ. App. 1921). And in the following cases where no new homestead had been acquired, it was held that the wife's rights were not lost. Blumer *v.* Allbright, 64 Neb. 249, 89 N. W. 809 (1902); Collins *v.* Boyett, 87 Tenn. 334, 10 S. W. 512 (1889).

[19] See cases cited in notes 17 and 18.

[20] Powell *v.* Powell, 29 Vt. 148 (1856); Gleason *v.* Gleason, 4 Wis. 64 (1855).

[21] Collins *v.* Boyett, 87 Tenn. 334, 10 S. W. 512 (1889). See WAPLES, HOMESTEAD AND EXEMPTION, 582.

law.[1] Yet the situation seems *a priori* to present little inherent difficulty. The purpose of bankruptcy proceedings is to administer insolvent estates fairly for the benefit of all interested parties,[2] and to this end bankruptcy law passes all property of the bankrupt to a trustee.[3] In a business sense policies of insurance on the bankrupt's life are assets of his estate (1) when the bankrupt or his estate is the beneficiary,[4] or (2) when the policy has a cash surrender value payable to the bankrupt, or (3) when the policy reserves to the bankrupt a power to change the beneficiary.[5] On its face the Bankruptcy Act seems to pass such policies to the trustee, as property which the bankrupt could have transferred, with a proviso that the bankrupt may retain policies which have a cash surrender value payable to himself upon paying to the trustee the amount of such cash surrender value.[6] Such a disposition would be logical, simple, and just.

But the provisions of the Bankruptcy Act relating to the bankrupt's life insurance policies have been the subject of judicial interpretation. After conflicting decisions in the lower courts,[7] the Supreme Court in *Burlingham* v. *Crouse*[8] construed the proviso of section 70 a (5). It there

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[1] See Samuel Davis, "What are the Rights of the Bankrupt's Trustee to His Life Insurance Policies?" 24 GREEN BAG, 419.

[2] See 1 REMINGTON, BANKRUPTCY, 2 ed., 15.

[3] The general principle of bankruptcy law is that all property of the bankrupt passes to the trustee, subject to his right of disclaimer of any property which he considers onerous. This general principle is subject to some qualifications not germane to the present discussion.

[4] The right to the face value of the policy, though future and contingent, is presently transferable for value. Grigsby *v.* Russell, 222 U. S. 149 (1911). Indeed, in extreme cases the present value of such a right may approach the face value of the policy.

[5] The power to change the beneficiary allows the insured to transfer the right to the face value at will. First National, etc. *v.* Security, etc. Co., 222 S. W. 832 (Mo., 1920). This may be done by appointing the transferee beneficiary, or by appointing himself beneficiary and transferring that right.

[6] "SEC. 70. TITLE TO PROPERTY.—a The trustee . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . ." 30 STAT. AT L. 565.

Section 70 a (3) may properly be relied on to pass the power to change beneficiaries to the trustee. Cohen *v.* Samuels, 245 U. S. 50 (1917). The peculiar wording of this section renders it meaningless if taken literally, since a power which the bankrupt might have exercised for himself he might also have exercised for another. The intent behind the section is perfectly clear, however, and can be effected by limiting the application of the second part of the section to powers which the bankrupt might have exercised *exclusively* for some other person.

[7] *In re* Slingluff, 106 Fed. 154 (D. Md., 1900); *In re* Orear, 178 Fed. 632 (8th Circ., 1910). *Contra, In re* Josephson, 121 Fed. 142 (S. D. Ga., W. D., 1903); Gould *v.* New York Life Ins. Co., 132 Fed. 927 (E. D. Ark., W. D., 1904).

[8] 228 U. S. 459 (1913).

held that where a policy payable to the bankrupt's estate had been pledged to the insurer for a loan larger than the cash surrender value the trustee took no interest in the policy. Mr. Justice Day's reasoning was that the proviso was in the nature of additional and exclusive legislation,[9] so that only policies having an actual cash surrender value passed to the trustee, and these only to the extent of the cash surrender value.[10] Two companion cases [11] of *Burlingham* v. *Crouse* followed this reasoning where the insured bankrupt had died between the filing of the petition and the adjudication in bankruptcy, and held the trustee entitled to the amount of the cash surrender value and the beneficiary entitled to the balance. As an original question the soundness of this reasoning may be doubted,[12] but these cases seemed to establish the rule that the actual cash surrender value at the time of the filing of the petition passed to the trustee.

In *Frederick* v. *Fidelity Mutual Life Insurance Co.*[13] the Supreme Court has recently held that the trustee could not recover the cash surrender value from the insurer where the insured bankrupt had died after the adjudication in bankruptcy and the insurer had paid the beneficiary the face value of the policy. The opinion stresses the good faith of the insurer and the lack of notice of the bankruptcy. But an adjudication in bankruptcy is generally held a constructive notice to all the world.[14] Moreover, payment by a debtor to the bankrupt or his assignee instead of to the trustee in bankruptcy is no defense, even though in good faith.[15] So, unless this case is a novel exception to these well-established principles, the beneficiary must have had a right to the full face value of the

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[9] The proviso was a part of the original Bankruptcy Act of 1898. 30 STAT. AT L. 566. It did not, however, appear in the earlier statutes on bankruptcy. 2 STAT. AT L. 19, 23; 5 STAT. AT L. 440, 442; 14 STAT. AT L. 517, 522.

This reasoning may be in part due to, and in turn has been the cause of, uncertainty whether "payable to himself" is to be taken with "policy" or with "cash surrender value." The latter view is grammatically correct and is in accord with the whole tenor of the proviso and of the Act. But courts have talked almost indifferently about policies payable to the bankrupt and cash surrender values payable to the bankrupt.

[10] The last words of the proviso itself are "otherwise the policy shall pass to the trustee as assets."

[11] Everett *v.* Judson, 228 U. S. 474 (1913); Andrews *v.* Partridge, 228 U. S. 479 (1913).

[12] Certainly the result is an unusual meaning for words which seem unambiguous and wholly consistent with the rest of the Act. There seems to be no historical reason for such a construction. A policy of leniency toward the bankrupt may account for such a strained interpretation, but that is properly a legislative matter to be regulated by exemption statutes which are given full effect by section 6 of the Bankruptcy Act, reinforced by Holden *v.* Stratton, 198 U. S. 202 (1905).

It may be noted that in Cohen *v.* Samuels, 245 U. S. 50 (1917), followed by Cohn *v.* Malone, 248 U. S. 450 (1919), the Court, speaking this time through Mr. Justice McKenna, qualified the reasoning of those former cases and relied on 70 a (3) and 70 a (5) of the Bankruptcy Act to allow the trustee to reach the policies.

[13] U. S. Sup. Ct., Oct. Term, 1920, no. 547. For the facts of this case, see RECENT CASES, *infra*, p. 84.

[14] Mueller *v.* Nugent, 184 U. S. 1 (1902). See *In re* Mertens, 134 Fed. 101, 105 (N. D. N. Y., 1905).

[15] Palmer *v.* Jordan, 163 Mass. 350 (1895). See Conner *v.* Long, 104 U. S. 228, 232 (1881). The reason is that the transfer by law is a complete legal assignment, not like the ordinary assignment of a chose in action, and so cannot be defeated by sale to a *bona fide* purchaser.

policy at the time of payment. This is inconsistent [16] with the companion cases of *Burlingham* v. *Crouse*, which gave the beneficiary only the surplus after paying the cash surrender value to the trustee.

This unsatisfactory state of the law will continue until it is seen just what it is that the trustee gets in such a situation. When an ordinary policy of life insurance, payable to a third person beneficiary, with a cash surrender value,[17] and a power in the insured to change the beneficiary,[18] is in force, it is submitted that the insured has a right against the insurer for the cash surrender value, conditional however upon the surrender of the policy, and that the beneficiary has a right against the insurer for the face value of the policy, conditional however upon death of the insured, and also subject to be defeated by a change of beneficiaries. In the nature of things either of these conditional rights is defeated by perfection of the other. The only effect of bankruptcy on this situation is to substitute the trustee for the insured. The trustee may then, subject to the bankrupt's right of redemption, get the cash surrender value, but only by surrendering the policy; or he may change the beneficiary.[19] But unless and until he does one of these acts the conditional right of the original beneficiary remains unchanged and may be perfected at any time by death of the insured. Thereafter the trustee has no more right to the cash surrender value than the beneficiary would

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[16] The policy in the principal case was payable in terms to a third person while those in the other cases were payable to the estate of the insured. But the significant point is to whom the cash surrender value was payable, and this was payable to the insured bankrupt in all these cases. See footnote 17, *infra*. Cohen *v.* Samuels, *supra*, is a square holding that the trustee can reach the cash surrender value where the policy is payable in terms to a third person beneficiary with a power in the insured to change the beneficiary as readily as where the policy is payable to the estate of the insured.

The contest in the principal case was between the trustee and the insurer, while in the other cases it was between the trustee and the beneficiary, but certainly this accident of procedure should not affect the substantive rights of the parties.

[17] When is the cash surrender value payable to the insured? It is clearly so when the insured is also beneficiary or when the policy so provides expressly. But more often there is no express provision as to this point in the policy. The popular understanding is that when a man insures his life and pays the premiums he is himself entitled to the cash surrender value. But it is well settled that in the absence of a power to change the beneficiary the insured cannot by himself surrender the policy and get the cash surrender value, because the beneficiary has a vested interest therein. Mutual Life Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 (1904); Ferguson *v.* Phoenix, etc. Co., 84 Vt. 350, 79 Atl. 997 (1911). But where there is a power in the insured to change the beneficiary it is submitted that there is no vested right in the beneficiary and so no obstacle to prevent giving effect to the general understanding of the contract. The cash surrender value should be payable to the insured in such a case, but the authorities are divided. Crice *v.* Illinois Ins. Co., 122 Ky. 572,92 S. W. 560 (1906); McKinney *v.* Fidelity, etc. Co., 270 Mo. 305, 193 S. W. 564 (1917). *Contra*, Holder *v.* Prudential Ins. Co., 77 S. C. 299, 57 S. E.853 (1907); Roberts *v.* Northwestern, etc. Co., 143 Ga. 780, 85 S. E. 1043 (1915).

[18] This power should have no effect upon the right of the beneficiary, except to render it contingent instead of vested, unless and until the power is properly exercised. And this has in general been the ruling of the courts. See *In re* Jones, 249 Fed. 487 (D. M. D. 1917). This question is of tremendous practical importance because of its bearing on the application of exemption statutes.

[19] Insurance counsel endeavoring to protect the beneficiary deny that the power to change beneficiaries can be exercised by any one except the insured. But this position seems untenable in view of section 70 a (3) of the Bankruptcy Act and Cohen *v.* Samuels, 245 U. S. 50 (1917).

have to the face value after a surrender of the policy. This, it is submitted, should have been the ground of the decision in *Frederick* v. *Fidelity Mutual Life Insurance Co.* and should be applied to all related cases.

RECENT CASES

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — RIGHT TO CASH SURRENDER VALUE OF LIFE INSURANCE POLICY — A bankrupt had a life insurance policy with a cash surrender value, a third person beneficiary, and a power reserved to himself to change the beneficiary. He died after the adjudication in bankruptcy and the defendant insurer paid the full face value of the policy to the beneficiary without notice of the bankruptcy. The plaintiff, trustee in bankruptcy, sues to recover the cash surrender value. *Held*, that the defendant is not liable. *Frederick* v. *Fidelity Mutual Life Insurance Co.*, U. S. Sup. Ct., Oct. Term, 1920, no. 547.

For a discussion of the principles involved in this case, see NOTES, *supra*, p. 80.

CONSTITUTIONAL LAW — EVIDENCE — PRIVILEGES UNDER THE FOURTH AND FIFTH AMENDMENTS — USE BY GOVERNMENT OF PAPERS STOLEN BY PRIVATE INDIVIDUAL. — The petitioner's private papers were stolen by detectives engaged by his employer. Evidence of an alleged fraudulent use of the mails was discovered therein, and voluntarily turned over to the Department of Justice, which had no prior knowledge of the theft. Before presentation of the papers to the grand jury, the petitioner filed a petition in the Federal District Court for an order for the return of the papers to him. *Held*, that the government is entitled to retain the papers for use against the petitioner. *Burdeau* v. *McDowell*, U. S. Sup. Ct., Oct. Term, 1920, No. 646.

The Supreme Court has recently indicated that it will give full effect to the privileges guaranteed by the Fourth and Fifth Amendments. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, U. S. Sup. Ct., Oct. Term, 1920, No. 250. See Osmond K. Fraenkel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361. But the privilege against unreasonable search and seizure has been held applicable only to action by government officers or their authorized agents. *Bacon* v. *United States*, 97 Fed. 35 (8th Circ.). See *Weeks* v. *United States*, 232 U. S. 383, 398; *Flagg* v. *United States*, 233 Fed. 481, 483 (2d. Circ.). The purpose of this Amendment, it is submitted, is to restrain unscrupulous government officers from interfering with domestic tranquillity, rather than to enable Federal offenders to avoid detection and prosecution. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 424 *et seq.*; 2 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., §§ 1901–2. To safeguard his constitutional rights effectively, the petitioner might well be entitled to a return where any connection, although short of an agency, can be shown between Federal officials and the thief, before the theft. But where, as here, there is no connection, the petitioner must rely upon extra-Constitutional rights. It is submitted that the vague reason given by the dissenting justices, *viz.*, the lessening of respect for law "by resort in its enforcement to means which shock the common man's sense of decency and fair play," is a doubtful basis for such a right. The Fifth Amendment will not be violated by introducing these papers at the trial. *Lyman* v. *United States*, 241 Fed. 945 (9th Circ.). Petitioner's only remedy is an action for damages against the thief.